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June 2, 2006

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Federal Communications Commission
Office of Secretary

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, CS Docket No. 98-120.

Dear Ms. Dortch:

Enclosed please find an original and four (4) copies of an *ex parte* submission, filed on behalf of the National Association of Broadcasters, entitled "Promoting the Public Interest Benefits of Broadcasting in the New Millennium: The FCC Can and Should Update Its Existing Carriage Regulations to Meet the Demands of the Digital Age."

As always, we appreciate your courtesies.

Respectfully submitted,

Helgi Walker

Helgi C. Walker

Enclosures

cc: Chairman Martin
Commissioner Adelstein
Commissioner Copps
Commissioner McDowell
Commissioner Tate
Heather Dixon
Rudy Brioche
Legal Advisor to Commissioner McDowell
John Grant
Sam Feder
Matthew Berry

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List A B C D E

PROMOTING THE PUBLIC INTEREST BENEFITS OF BROADCASTING IN THE NEW MILLENNIUM: THE FCC CAN AND SHOULD UPDATE ITS EXISTING CARRIAGE REGULATIONS TO MEET THE DEMANDS OF THE DIGITAL AGE

Helgi C. Walker
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1776 K Street NW
Washington, DC 20006

June 2, 2006

Prepared on behalf of the National Association of Broadcasters

EXECUTIVE SUMMARY

This White Paper explains why the FCC can and should move immediately to update the existing regulatory regime for cable carriage of broadcast television, which originated in the early 1990s, to meet the new demands of the digital age. As part of a successful and orderly transition to digital television, and in order to continue to preserve free over-the-air broadcasting, the Commission must act to ensure that cable operators are not permitted to strip out and thus block from viewers any portion of the multi-stream broadcasts (or "multicasts") that broadcasters are now beginning to provide to the American public. By safeguarding broadcasters' ability to deliver their multicasts to viewers without interference from cable, the FCC would effectuate numerous important and well-established public policy goals: (i) the development and deployment of the vital content provided by multicasting, thereby (ii) encouraging the swift transition to digital television and its attendant benefits for, *inter alia*, the economy, public safety, and deficit reduction; (iii) diversity in video programming for all viewers; (iv) the preservation of free, over-the-air broadcasting for those Americans who lack access to other programming delivery sources; and ultimately (v) the constitutional interests of broadcasters and viewers alike in disseminating and receiving a rich variety of broadcast communications.

Contrary to the claims of the cable industry, the Constitution does *not* bar the Commission from taking steps to further these vital national policies.[1] The existing must-carry statute has been declared constitutional by the Supreme Court,[2] and cable has carefully cabined its constitutional attack to digital carriage. Thus, all that is at issue here is the legality of the *extension* of the current lawful carriage arrangement into the digital context. Cable advocates' constitutional arguments on this limited question hinge upon on the assertion that the burden of digital carriage obligations is somehow greater than the burden of existing, concededly constitutional analog obligations.

This claim is simply untenable as a matter of plain fact, and without it cable's entire legal position crumbles: multicasts occupy the *very same* amount of bandwidth on a cable system as do the analog single-stream broadcasts currently transmitted over cable systems (6 MHz), and this amount will only decrease over time as compression technologies improve. In fact, upgraded cable systems already can and do compress a 6 MHz broadcast signal to 3 MHz. Thus, the carriage of multicast signals does not take an iota more – and with compression requires *half as much* – capacity than current carriage obligations. Moreover, cable systems recently have dramatically expanded their system capacities such that the burden of carriage, whether analog or digital, has shrunk as a relative matter as well. There is no "sixfold"[3] expansion of any burden on cable operators' rights, whether speech- or property-based. Quite the contrary, cable will be

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1 *See generally* Cooper & Kirk, PLLC, *A Mandatory Multicast Carriage Requirement Would Violate Both the First and Fifth Amendments* (Sept. 6, 2005), *available at* www.ncta.com ("Cooper & Kirk White Paper").

2 *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) ("*Turner II*") (upholding Section 4 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 4, 106 Stat. 1460, 1471 (codified at 47 U.S.C. § 534) ("1992 Cable Act")).

3 Cooper & Kirk White Paper at 5.

better off in terms of available capacity, even under a multicast carriage obligation, than ever before in its history.

Cable's real concern, then, is not system burdens but the increased competition that multicasting will enable broadcasters to bring to bear in the video marketplace. The further facts that cable objects only to *commercial* multicasts (having agreed to carry non-commercial multicasts without a constitutional peep, and indeed with great fanfare[4]) and has no quarrel with carrying a single high definition stream of digital programming ("HDTV") (which takes up an entire 6 MHz channel) confirms this anticompetitive animus.

As fully explained below, FCC action to ensure that multicast programming reaches all those who wish to see it without being blocked by cable operators is wholly consistent with the First Amendment and does not implicate the Takings Clause of the Fifth Amendment. Notably, while cable advocates have attempted to limit their claims to digital carriage, the logical implications of their arguments, if accepted, would bring the *entire* must-carry regime into a state of legal disarray. Accordingly, none of the putatively constitutional concerns raised by cable operators should delay the Commission from updating the 1990s must-carry regulations to meet the demands of the digital age.

The Public Interest Benefits of Broadcasting in the New Millennium—As Congress confirmed only last session in enacting the Digital Television Transition and Public Safety Act of 2005,[5] it is a paramount national policy to propel the television industry into the digital era. A swift transition to digital television and the return of analog broadcast channels will permit more efficient use of the electromagnetic spectrum,[6] resulting "in immense benefits to the United States in terms of homeland security, innovation and investment in new technologies, new employment opportunities, and international competitiveness."[7] Digital television will also allow the provision of innovative new programming and services to the American people. This new programming will be an important driver for consumers making the jump from analog to digital television sets.

Both the United States Supreme Court and the FCC have consistently recognized the long-standing and "important governmental interest" in "preserving the benefits of free, over-

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[4] *See* Media Release, Nat'l Cable & Telecomms. Ass'n, Public Television and Cable Announce Major Digital Carriage Agreement: Agreement Provides Public Television with Digital Cable Carriage During and After the Digital TV Transition (Jan. 31, 2005), *available at* http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=reltyp1&contentId=358 (lauding multicast and other digital carriage of non-commercial television programming).

[5] Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, tit. 3, 120 Stat. 4, 21 (2006) (codified at 47 U.S.C. § 309 note).

[6] *See In re Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516, 4528 (2005) ("*Second DTV Must Carry Order*"); *see* 151 Cong. Rec. S14211 (daily ed. Dec. 21, 2005) (statement of Sen. Hatch).

[7] FCC, Media Bureau Staff Report, *Concerning Over-The-Air Broadcast Television Viewers*, MB Dkt. No. 04-210, 2005 WL 473322, at *1, (Feb. 28, 2005) ("*Over The Air Staff Report*"); *see id.* at *10.

the-air local broadcast television."[8] In enacting the 1992 Cable Act, Congress emphasized that "[b]roadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate."[9] The importance of broadcast television, which led Congress in 1992 to enact – and the Supreme Court to uphold – the current must-carry statute, is only *amplified* by the benefits that the conversion to digital television can deliver.

As we enter the digital television world, broadcasters face even greater hurdles to survival than they did in 1992. Chief among the obstacles confronting broadcasters is the ability and incentive that cable operators possess to deny carriage to the innovative and numerous program offerings made possible by multicasting. Moreover, to survive in an environment of increasingly abundant and diverse sources and types of programming, broadcasters must have the ability to deliver the same sort of "niche" programming, such as the additional content in multicasts, that other video providers are able to offer And consumers, who were already disinclined in 1992 to switch from cable to over-the-air systems to watch broadcast programming, have after almost a decade of must-carry come to expect a perfectly seamless viewing experience. Without the certainty that this consumer demand for seamless viewing can be met, multicasting's viability is placed in real doubt.

Despite these risks, broadcasters have in good faith made significant investments to bring the benefits of digital television to the American public, as Congress and the FCC have commanded. There is certainly a compelling interest in making sure that these investments are not stranded due to the anti-competitive conduct of the cable industry.

In light of the manifold public interest benefits of digital television, broadcasters merely ask that the current carriage arrangement, which Congress enacted without any distinction between digital and analog,[10] be carried over into the digital context. As the Commission has emphasized, the cooperation and participation of the cable industry with respect to the delivery of broadcast programming over cable is necessary to vindicate the interrelated goals of

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[8] *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) ("*Turner I*"); *see also Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, 12821, 12835 (1997) ("*DTV Fifth Report & Order*") ("One of our objectives is to promote broadcasters' ability to build digital businesses so that their valuable free programming service will continue.").

[9] 1992 Cable Act § 2(a)(11) (codified at 47 U.S.C. § 521 note). A recent study conducted by Harris Interactive concludes that "[s]eventy-seven percent of U.S. adults watch local broadcast news." *Most Get News From Broadcasters*, United Press Int'l, Feb. 25, 2006, http://upi.com/NewsTrack/view.php?StoryID=20060225-110859-4086r; *see* Harris Interactive, *The Harris Poll #20: Seven in 10 U.S. Adults Say They Watch Broadcast News at Least Several Times a Week* (Feb. 25, 2006), *available at* http://www.harrisinteractive.com/harris_poll/index.asp?PID=644. "Fifty-one percent of Americans get their news every day from local TV news, topping a list of information sources in today's fractured media landscape." Paul J. Gough, *Gallup: People Want Local News*, The Hollywood Reporter.com, Dec. 22, 2004, http://www.hollywoodreporter.com/thr/television//brief_display.jsp?vnu_content_id=1000741092.

[10] *In re Carriage of Digital Television Broadcast Signals, Amendments to Part 76 of the Commission's Rules, Implementation of the Satellite Home Viewer Improvement Act of 1999; Local Broadcast Signal Carriage Issues; Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, First Report and Order and Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2606 (2001) ("*First DTV Must Carry Order*").

promoting innovation and competition through the advancement of digital broadcast television and the preservation of broadcasting.[11] Because cable operators have shown themselves to be more interested in hindering broadcasters' efforts to deliver the promise of digital television to the American viewing public than in moving the transition forward, an anti-stripping prohibition (or multicast carriage obligation) is critical to ensure that all citizens, whether they subscribe to cable or not, continue to have access to local broadcast programming. And promoting the availability of innovative new digital broadcast content will help incentivize viewers to make their own personal transition to digital televisions, thereby furthering the larger goal of completing the digital transition and finally bringing all of the benefits of that transition to fruition.

The Absence of Constitutional Concerns—Cable advocates' extreme claims aside, nothing in the Constitution prohibits the FCC from updating our nation's regulatory policies on cable carriage to advance these important interests in the digital age. Indeed, by conceding the permissibility of existing analog carriage obligations and agreeing to carry non-commercial multicast streams as well as HDTV broadcasts, cable operators' claim of unconstitutionality is limited to protesting the carriage of non-primary digital commercial signals, even where those signals take up *less* space on the cable systems than current analog signals do. This claim is as weak as it sounds.

The First Amendment—A rule prohibiting the blockage of multicast commercial signals is entirely consistent with the First Amendment. Cable advocates' argument as to why the First Amendment requires that they should be permitted to strip out portions of digital television broadcasts tells only one side of the story – *theirs*. In attempting to inflate their anti-competitive business concerns to constitutional dimension, cable advocates tout their supposed First Amendment interests as if those interests were the only ones that hang in the balance. But, as the Supreme Court has held, it is the interests of viewers that are "paramount,"[12] and there can be no dispute that broadcasters also possess a constitutional interest in maintaining their ability to reach those who wish to view their programming and in exercising their editorial discretion in deciding how to program the new digital spectrum.[13]

Despite cable operators' best efforts to suggest otherwise, an anti-stripping prohibition is a content-neutral regulation subject only to intermediate scrutiny. The Supreme Court has twice held that current cable must-carry rules are content-neutral,[14] explaining that the "overriding objective" of must-carry requirements are "not to favor programming of a particular subject

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[11] *See, e.g., id.* at 2601.

[12] *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

[13] *See, e.g., Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity."); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) ("The First Amendment protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention.") (citation and quotations omitted)); *Columbia Broad. Sys., Inc. v. DNC*, 412 U.S. 94, 110 (1973) (explaining that, under the First Amendment, television broadcasters enjoy the "widest journalistic freedom" consistent with their public interest responsibilities); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) (recognizing that broadcasting is a medium affected with First Amendment interests).

[14] *See Turner I*, 512 U.S. at 643; *Turner II*, 520 U.S. at 189.

matter, viewpoint, or format, but rather to preserve access to free television programming for . . . Americans without cable."[15] The technological nature of the signal being carried over cable systems – analog versus digital, or signals with a continuous range of values versus signals with a discrete set of values[16] – does not change this constitutional result. Extending the existing must-carry rules to multicast programming, thus continuing to preserve a diverse array of programming for viewers and indeed providing them with *additional* programming, advances the same constitutionally sound interests as the current must-carry regime to which the cable industry does not object.

The cable industry's only rejoinder is that strict scrutiny must apply because cable no longer maintains "bottleneck monopoly power" over cable television programming.[17] This argument is both irrelevant and factually incorrect. The need to preserve a wide array of programming for viewers and especially those without access to cable television – not cable's bottleneck monopoly power – was the warrant for the Supreme Court's decision to apply intermediate scrutiny. Moreover, the competitive disparity between broadcast television and non-broadcast television has only grown since Congress first enacted the must carry requirement in 1992.[18] The cable industry's emphasis on DBS as a source of competitive pressure on broadcast television misses the mark. The question is whether alternatives to broadcast television threaten the programming options of those Americans with access only to broadcast television – not whether one or two (or even more) non-broadcast modes of programming delivery form that threat.

Because the must-carry regime has been declared content-neutral under established precedent, any modification to that regime must be sustained as long as it furthers an important government interest and is narrowly tailored to serve that interest.[19] Extending carriage obligations to multicasting easily meets this test. First, multicasting carriage rights advance the two interrelated goals that the Supreme Court validated in *Turner I* and *Turner II*: (1) "preserving the benefits of free, over-the-air local broadcast television"; and (2) "promoting the widespread dissemination of information from a multiplicity of sources."[20] Absent the ability to multicast, and to have multicast programming actually *reach* a wide audience, broadcasters will

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15 *Turner I*, 512 U.S. at 646.

16 *See* Leon W. Couch II, Digital and Analog Communications Systems 4 (2d ed. 1987).

17 *See* Cooper & Kirk White Paper at 6-7.

18 Since 1992, the percentage of United States television households that rely on over-the-air broadcast service has dropped from roughly 40 percent, *see Turner I*, 522 U.S. at 646, to only 14 percent, *see In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Dkt. No. 05-255, 2006 WL 521465, at *5, *30 (Mar. 3, 2006) ("*Twelfth Annual MVPD Report*"). And broadcast television stations' audience shares have continued to fall as cable and DBS penetration has increased. *See id.* at *139. Now more than 85% of television households subscribe to some form of MVPD service, such as cable or DBS. *Id.* at *8.

19 *See United States v. O'Brien*, 391 U.S. 367, 377 (1968).

20 *See Turner I*, 512 U.S. at 662; *Turner II*, 520 U.S. at 180-81; *see also* 1992 Cable Act § 2(a)(11) (finding that "[b]roadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate"); *id.* § 2(a)(12) (finding that "[t]here is a substantial governmental interest in promoting the continued availability of . . . free [over-the-air] television programming, especially for viewers who are unable to afford other means of receiving programming").

not be able to attract the advertising revenue necessary to maintain a rich array of programming for all viewers but particularly those with access only to broadcast television. As the Supreme Court confirmed, the important objectives of the must-carry regime would *not* be "satisfied by the preservation of a rump broadcasting industry providing a minimum of broadcast service to Americans without cable."[21] This is perfectly sufficient, under current case law, to show that a multicast carriage mandate would serve an important government interest. But an anti-stripping rule would *also* advance the interest in promoting fair competition in the video marketplace, recognized by four Justices in the *Turner* cases,[22] and the more recent interest in a swift transition to digital television, with its many independent public benefits for the economy and public safety.

Second, preventing cable from blocking the delivery of multicast programming to viewers does not burden substantially more speech than necessary in advancing these important government interests. There is no question that the existing must-carry rules are "narrowly tailored to preserve a multiplicity of broadcast stations for . . . American households without cable."[23] In so holding, the Supreme Court rejected the cable industry's supposedly less restrictive alternatives, including the use of the A/B switch because of its "technical shortcomings."[24] Here, the contemplated carriage obligation imposes less of a burden, in both absolute and relative terms, on cable operators than the existing must-carry regime. At most, multicasts occupy precisely the same amount of spectrum (6 MHz) as current broadcast signals. But digital compression technology and other technological advances allow for even more efficient use of bandwidth, so that digital broadcasting such as multicasts actually *reduces* the burden on cable operators, thus ensuring the constitutional validity of multicast must-carry regulations. Requiring cable carriage of multi-stream broadcasting is fully consonant with the First Amendment.

The Fifth Amendment—A prohibition against the stripping of multicast signals also does not implicate the Takings Clause of the Fifth Amendment.[25] Despite the sweeping and misleading arguments of the cable industry, not all government regulation of property amounts to a taking under the Fifth Amendment. Indeed, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[26] For several reasons, a multicast carriage duty is a typical government regulation that "by definition, involves the adjustment of rights for the public good . . . . To require compensation in all such circumstances would effectively compel the government to regulate by purchase."[27]

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21 *Turner II*, 520 U.S. at 192.

22 *Turner I*, 512 U.S. at 652; *see also Turner II*, 520 U.S. at 180-81.

23 *Id.* at 215-16.

24 *Id.* at 245.

25 U.S. Const. amend. V.

26 *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

27 *Andrus v. Allard*, 444 U.S. 51, 65 (1979).

At the outset, it bears emphasis that the cable industry has never seriously argued that the existing must-carry rules constitute a taking and indeed recently conceded that they do not.[28] Yet, somehow, the cable industry contends that the transition from analog to digital crosses some threshold that transforms carriage duties from a valid regulation into a "Fifth Amendment problem."[29] This argument makes no sense. As previously explained, the technological advances associated with digital broadcasting, such as multicasting, actually *decrease* the burden on cable operators. Nor could the change from analog to digital signals create a permanent physical occupation where there was none before. Thus, if the current analog must-carry regime does not violate the Fifth Amendment, *a fortiori* digital carriage does not result in a taking either. In any event, the proposed anti-stripping rule does not amount to a taking under either established takings analysis; it is neither a "*per se*" taking nor a "regulatory" taking.

The creation of carriage duties for cable operators with respect to multicast programming is not a *per se* taking because it does not result in a "permanent physical occupation" of the operator's property.[30] As the Supreme Court has explained, a permanent physical occupation is a rare and easily identified event.[31] Thus, for example, the Supreme Court found the installation "of plates, boxes, wires, bolts, and screws" to be an "obvious" permanent physical occupation.[32] No such physical occupation occurs in this instance. The cable bandwidth that multicasting utilizes transmits bits of data at the speed of light and, importantly, the cable operator retains uniform control over the cable headend equipment, its local offices, and all other transmission equipment. Courts are in broad agreement that this type of minor technological accommodation does not qualify as a *per se* taking under the Fifth Amendment.[33] Indeed, the Federal Circuit found that "unwanted movement of telecommunications traffic across [common carrier] loops" did not amount to a "taking of . . . property."[34]

Multicast carriage obligations would not result in a regulatory taking either. The Supreme Court's partial takings inquiry focuses on three factors: (1) the character of the government action; (2) the economic impact of the government action; and (3) reasonable investment-backed expectations.[35] First, the character of the government action, which "is best viewed in the context of the industry it regulates," does not evidence a partial taking. Cable is a heavily regulated industry; it has been subject for more than four decades to significant federal and state oversight – including of course the existing must-carry rules. Second, no negative economic impact will result from extending the current carriage scheme to multicasting. To the contrary, and once again, technological changes have decreased whatever burdens the existing

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28 Cooper & Kirk White Paper at 16.

29 *Id.*

30 *FCC v. Florida Power Corp.*, 480 U.S. 245, 251 (1987).

31 *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 324 (2002).

32 *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 437-38 (1982).

33 *See, e.g., Qwest Corp. v. United States*, 48 Fed. Cl. 672, 693 (2001); *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441, 1444-46 (D.C. Cir. 1994)

34 *Qwest Corp.*, 48 Fed. Cl. at 693.

35 *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

must-carry rules place on cable operators. Finally, the cable industry simply has no credible claim of a reasonable investment-backed expectation in being permitted to block the non-primary portion of broadcasters' digital signals from reaching viewers. The cable industry's argument that it has upgraded its facilities to use digital capacity for its own purposes is not plausible. The cable industry operates under the current must-carry regime and does not object to broadcasters using the entire 6 MHz of bandwidth to send a single digital stream of analog television or HDTV. The cable industry's recent concoction of investment-based injury thus makes no sense given their willingness to continue to operate under the existing – *and more burdensome* – analog must-carry system and their willingness to permit broadcasters to use this same amount of bandwidth for HDTV programming. Ensuring carriage for multicasting, therefore, does not result in any sort of taking of property under the Fifth Amendment.

Even if there were taking here, which there is not, the cable industry's claim that it is wholly uncompensated for the carriage of broadcast programming is disingenuous. As the FCC's recent study on a la carte programming shows, approximately $15 of all cable price packages – or almost 30% of the average basic package price – represents charges for basic broadcast programming.[36] What cable thus seeks is not compensation, but double compensation. That business interest is not a constitutional concern.

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[36] *See* FCC, *Further Report on the Packaging and Sale of Video Programming Services to the Public*, at 19 & n.21 (Feb. 9, 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-263740A1.pdf; *see also* 1992 Cable Act § 2(a)(19) ("[A] substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates, independent television stations, and public television stations.").

TABLE OF CONTENTS

INTRODUCTION

This White Paper explains why the FCC can and should move immediately to update the existing regulatory regime for cable carriage of broadcast television, which originated in the early 1990s, to meet the new demands of the digital age. As part of a successful and orderly transition to digital television, and in order to continue to preserve free over-the-air broadcasting, the Commission must act to ensure that cable operators are not permitted to strip out and thus block from viewers any portion of the multi-stream broadcasts (or "multicasts") that broadcasters are now beginning to provide to the American public. By safeguarding broadcasters' ability to deliver their multicasts to viewers without interference from cable, the FCC would effectuate numerous important and well-established public policy goals: (i) the development and deployment of the vital content provided by multicasting, thereby (ii) encouraging the swift transition to digital television and its attendant benefits for, *inter alia*, the economy, public safety, and deficit reduction; (iii) diversity in video programming; (iv) the preservation of free, over-the-air broadcasting for those Americans who lack access to other programming delivery sources; and ultimately (v) the constitutional interests of broadcasters and viewers alike in disseminating and receiving a rich variety of broadcast communications.

Contrary to the claims of the cable industry, the Constitution does *not* bar the Commission from taking steps to further these vital national policies.[1] The existing must-carry statute has been declared constitutional by the Supreme Court,[2] and cable has carefully cabined its constitutional attack to digital carriage. Thus, all that is at issue here is the legality of the *extension* of the current lawful carriage arrangement into the digital context. Cable advocates' constitutional arguments on this limited question hinge upon on the assertion that the burden of digital carriage obligations is somehow greater than the burden of existing, concededly constitutional obligations.

This claim is simply untenable as a matter of plain fact, and without it cable's entire legal position crumbles: multicasts occupy the *very same* amount of bandwidth on a cable system as do the analog single-stream broadcasts currently transmitted over cable systems (6 MHz), and this amount will only decrease over time as compression technologies improve. In fact, upgraded cable systems already can and do compress a 6 MHz broadcast signal to 3 MHz. Thus, the carriage of multicast signals does not take an iota more – and with compression requires *half as much* – capacity than current carriage obligations. Moreover, cable systems recently have dramatically expanded their system capacities such that the burden of carriage, whether analog or digital, has shrunk as a relative matter as well. There is no "sixfold"[3] expansion of any burden on cable operators' rights, whether speech- or property-based. Quite the contrary, cable will be better off in terms of available capacity, even under a multicast carriage obligation, than ever before in its history.

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1 *See generally* Cooper & Kirk, PLLC, *A Mandatory Multicast Carriage Requirement Would Violate Both the First and Fifth Amendments* (Sept. 6, 2005), *available at* www.ncta.com ("Cooper & Kirk White Paper").

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Cable's real concern, then, is not system burdens but the increased competition that multicasting will enable broadcasters to bring to bear in the video marketplace. The further facts that cable objects only to *commercial* multicasts (having agreed to carry non-commercial multicasts without a constitutional peep, and indeed with great fanfare[4]) and has no quarrel with carrying a single high definition stream of digital programming ("HDTV") (which takes up an entire 6 MHz channel) confirms this anticompetitive animus.

As fully explained below, FCC action to ensure that multicast programming reaches all those who wish to see it without being blocked by cable operators is wholly consistent with the First Amendment and does not implicate the Takings Clause of the Fifth Amendment. Notably, while cable advocates have attempted to limit their claims to digital carriage, the logical implications of their arguments, if accepted, would bring the *entire* must-carry regime into a state of legal disarray. Accordingly, none of the putatively constitutional concerns raised by cable operators should delay the Commission from updating the 1990s must-carry regulations to meet the demands of the digital age.

I. THE NEED TO PROMOTE THE CONTINUED DEVELOPMENT AND DISSEMINATION OF BROADCAST TELEVISION IS GREATER THAN EVER BEFORE.

The transition to digital television creates the promise of myriad benefits for the American public, as Congress and the Commission have repeatedly recognized. These new benefits make the preservation of free over-the-air broadcasting, a long-standing and important national goal in and of itself, more important than ever. While broadcasters have been faithfully making significant capital investments in digital facilities and operations in response to government mandates, major competitive obstacles to broadcasters' success in general and the viability of their new digital programming in particular still stand in the way. For instance, in an increasingly fragmented video programming market, broadcasters must be able to offer viewers specialized "niche" programming, just like other video providers currently do, and multicasting provides the means of doing just that. This innovative new content will help encourage consumers to make the leap to digital television technologies. But cable operators have every reason to – and have made crystal clear that they *will* – take affirmative action to strip out broadcasters' multicast signals and prevent them from reaching the cable subscribers who otherwise would be able to receive them. FCC action to prevent such conduct from impeding the fruition of the many public benefits of the digital transition, is critically important and amply justified as matter of sound policy.

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[4] *See* Media Release, National Cable & Telecomms. Ass'n, Public Television and Cable Announce Major Digital Carriage Agreement: Agreement Provides Public Television with Digital Cable Carriage During and After the Digital TV Transition (Jan. 31, 2005), *available at* http://www.ncta.com/ContentView.aspx?hidenavlink=true&type=reltyp1&contentId=358 (lauding multicast and other digital carriage of non-commercial television programming).

A. A Swift and Seamless Transition to Digital Television Will Provide Numerous Important Benefits to the American Public.

It has been repeatedly recognized in numerous contexts that the transition to digital television is a major national policy goal that will benefit the viewing public, public safety, and the economy. Members of Congress have described the digital transition as "arguably the most important consumer technology issue facing the Nation."[5] Thus, "expediting the DTV transition" has long been "a top priority."[6]

As the FCC has explained, "[t]he transition to digital television represents a critical evolutionary step in broadcast television."[7] The Commission has recognized that the transition to DTV will deliver two major categories of benefits to the American public. First, "[i]t allows delivery of brilliant, high-definition, multiple digital-quality programs, and ancillary and supplementary services such as data transfer" by broadcasters, using the same amount of spectrum currently occupied by a single analog broadcast channel.[8] Second, "the completion of the DTV transition will provide a significant benefit to public safety entities" by freeing additional spectrum for their needs.[9]

While Congress and the FCC had initially set December 31, 2006 as the ideal deadline for the completion of the transition to DTV, and although substantial progress has been made, much still remains to be done. At present, more than 1500 television stations are broadcasting digital signals that reach 99.9% of the nation's television households,[10] and digital television

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[5] Staff Discussion Draft on the Transition to Digital Television: Hearing Before the Subcomm. on Telecommunications and the Internet of the H. Comm. on Energy and Commerce, 107th Cong., 2d Sess. 11 (2002) ("Discussion Draft Hearing") (statement of Rep. Sawyer).

[6] 152 Cong. Rec. H45 (daily ed. Feb. 1, 2006) (statement of Rep. Barton). The legislative history of the transition-related amendment to the Balanced Budget Act of 1997 demonstrates the importance that Congress has placed on the transition for the last decade. *See, e.g.*, H.R. Rep. No. 105-217, at 576 (1997) (Conf. Rep.), *as reprinted* in 1997 U.S.C.C.A.N. 176, 197 (amending the Communications Act to "require the Commission to reclaim the 6 MHz broadcasters now use for analog transmission by no later than December 31, 2006"); *id.* at 578 ("New section 309(j)(14)(C) requires the Commission to ensure that the spectrum now used for analog television service is returned as required by Commission direction and that the Commission must reclaim and reorganize the spectrum, consistent with the objectives of section 309(j)(3) of the Communications Act.").

[7] *In re 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area*, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620, 13825 (2003) ("*2002 Biennial Review Order*").

[8] *In re Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Fifth Report and Order, 12 FCC Rcd 12809, 12811 (1997) ("*DTV Fifth Report & Order*").

[9] FCC, Wireless Bureau, *Report to Congress On the Study to Assess Short-Term and Long-Term Needs for Allocations of Additional Portions of the Electromagnetic Spectrum for Federal, State and Local Emergency Response Providers*, at 23, *available at* http://hraunfoss.fcc.gov/edocs-public/attachment/DOC-262865A1.pdf.

[10] *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Dkt. No. 05-255, 2006 WL 521465, at *31 (Mar. 3, 2006) ("*Twelfth Annual MVPD Report*"); *Digital Television Transition: Hearing Before the S. Comm. on Commerce, Science & Transportation*, 109th Cong. 2 (2005) (testimony of Edward O. Fritts, President & CEO, NAB ("Fitts Testimony").

equipment sales are on the rise.[11] However, there remain as many as "73 million analog-only [television] sets in use in the [United States] that are not connected to an[y] MVPD service," and consumers are continuing to purchase millions of new analog-only sets each year.[12]

To spur the completion of the DTV transition, and in recognition of the present importance of that goal, Congress recently passed the Digital Television Transition and Public Safety Act of 2005.[13] This legislation sets a "hard date" of February 17, 2009 for the transition to digital and return of analog spectrum, at which point television viewers will no longer be able to rely on over-the-air analog television. In light the national significance of preserving access to free over-the-air broadcasting, Congress has allocated approximately $990 million of the expected $10 billion in proceeds from the auction of the broadcast spectrum for a digital-to-analog converter box program that will provide subsidies for the purchase of converter boxes by individuals who still rely on analog television at the end of the transition.[14]

1. By Providing a Wide Variety of Rich New Content to Consumers, Multicasting Will Further the Digital Transition.

Members of Congress, the Commission itself, and representatives across each of the industries involved in the DTV transition agree that the widespread availability of the innovative content that digital television promises to deliver to viewers will be a major driver in encouraging consumers to make the leap to digital television technologies and thus, moving the transition forward. For instance, Representative Tauzin has remarked: "Content is key. We all know it. If consumers are going to buy this equipment, sign up to these new broadband systems that are going to move it around, they want something rich and exciting in programming."[15] The FCC similarly has found that "many consumers' decisions to invest in DTV receivers will depend on the programs, enhanced features, and services that are not available on the NTSC service"[16] and, in recognition of this fact, has "urge[d] broadcasters to increase the amount of digital and high definition programming" in an effort to move the conversion to DTV forward.[17]

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[11] FCC, Media Bureau Staff Report, *Concerning Over-The-Air Broadcast Television Viewers*, MB Dkt. No. 04-210, 2005 WL 473322, at *6 (Feb. 28, 2005) ("*Over The Air Staff Report*").

[12] *Id.* at *5.

[13] Digital Television Transition and Public Safety Act of 2005, Pub. L. No. 109-171, tit. 3, 120 Stat. 4, 21 (2006) (codified at 37 U.S.C. 309 note)

[14] *Id.* §3005(a). In a similar effort to move the digital transition forward, the FCC has adopted rules requiring all new television sets and all TV interface devices (*e.g.*, VCRs, etc.) to include the capability of tuning and decoding over-the-air digital signals (commonly referred to as "DTV tuners") by 2007. *See In re Requirements for Digital Television Receiving Capability*, 20 FCC Rcd 18607 (2005); *In re Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Second Report and Order, 17 FCC Rcd 15978 (2002) ("*DTV Second Report and Order*"); *see also Over The Air Staff Report*, 2005 WL 473322, at *1.

[15] Discussion Draft Hearing at 6 (Statement of Rep. Tauzin).

[16] *DTV Fifth Report & Order*, 12 FCC Rcd at 12832.

[17] *In re Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Memorandum Opinion and Order on Reconsideration, 16 FCC Rcd 5946, 5950-51 (2001) ("*First DTV Periodic Report and Order*"), *on recon.*, 16 FCC Rcd 20594 (2001) ("First DTV Periodic Memorandum Opinion and Order"); *see DTV Fifth Report & Order*, 12 FCC Rcd at 12822 ("By permitting broadcasters to assemble packages

Indeed, cable advocates themselves tout the importance of content to the transition.[18] And, while the broadcast, cable, and electronics industries have clashed over many issues relating to the digital transition, they uniformly agree that consumers will not adopt DTV technology absent widespread availability of unique digital content.[19]

The ability to "multicast" made possible by digital broadcasting technology promises to deliver just such innovative content to the marketplace. Multicasting allows the simultaneous transmission of a package of *six or more* streams of standard digital programming.[20] In addition, multicasting permits the broadcast of CD-quality audio signals and the rapid delivery of data.[21] Broadcasters may transmit video, audio, and data simultaneously and "dynamically," meaning that they may switch back-and-forth with ease: "[f]or example, a broadcaster could transmit a news program consisting of four separate [standard definition television] programs for local news, national news, weather, and sports; while interrupting that programming with a single high definition television commercial with embedded data about the product; or transmit a motion

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of services that consumers desire, we will promote the swift acceptance of DTV and the penetration of DTV receivers and converters."); *id.* at 12827 ("Broadcasters can best stimulate consumers' interest in digital services if able to offer the most attractive programs, whatever form those may take, and it is by attracting consumers to digital away from analog, that the spectrum can be freed for additional uses.").

[18] *See* Cooper & Kirk White Paper at 13-14.

[19] *See, e.g.*, Comments of the Consumer Electronics Ass'n, CS Dkt. Nos. 98-120, 00-2, 00-96, at 7 (June 11, 2001) (noting that "as a result of the dearth of digitally originated programming on the market today, most digital consumers experience marginal and highly duplicative programming"); Reply Comments of the National Cable & Telecommunications Ass'n, CS Dkt. Nos. 98-120, 00-2, 00-96, at 8 (Aug. 16, 2001) (suggesting that broadcasters should "invest in compelling digital programming to prompt viewers to obtain digital tuners"); Discussion Draft Hearing at 34 (prepared statement of Robert C. Wright, President & CEO, NBC) (noting that for the transition to proceed, "the consumer must get better content than their analog television experience," and stating that "[e]xciting, high quality content will drive consumer acceptance of digital television"); *Spectrum for Public Safety Users: S. Comm. on Commerce, Science & Transportation*, 108th Cong. 14 (2004) (statement of David L. Donovan, President, Association for Maximum Service Television) ("Donovan Testimony") at 15 (explaining that "flagship DTV stations" are "especially significant to the DTV transition").

[20] *See, e.g., DTV Fifth Report & Order*, 12 FCC Rcd at 12817. The DTV Standard

> provides for 19.4 megabits per second ('mbps') for each 6 MHz channel over-the-air. . . . [T]he Commission drew the distinction between standard definition ('SDTV') and high definition ('HDTV') in the digital context. The electronics industry and ATSC define high definition television as having a vertical display resolution of 720p, 1080I, or higher; an aspect ratio capable of displaying a 16:9 image at the minimum resolution level; and receiving and reproducing Dolby digital audio. In contrast, standard definition digital displays resolution lower than high definition, requires no specific ratio, and produces 'usable' audio and picture.

In re Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules; Implementation of the Satellite Home Viewer Improvement Act of 1999; Local Broadcast Signal Carriage Issues; Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals, First Report and Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2628 (2001) ("*First DTV Must Carry Order*"). Even a standard definition digital program has higher visual quality than a program transmitted using analog technology.

[21] *See, e.g., DTV Fifth Report & Order*, 12 FCC Rcd at 12817.

picture in a high definition format, while simultaneously using the excess capacity for transmission of data unrelated to the movie."[22] Another possibility is "a digital television broadcast of a sporting event [that] could include multiple camera angles from which the viewer may select."[23] Or, a station multicasting during a weather emergency "could offer one primary news channel, one channel devoted solely to weather coverage, one channel devoted to rescue and relief information, one channel devoted to evacuation routes and traffic information, and one channel devoted to school and business closings."[24] All of this material is provided *free of charge* to the American public.

In practice, broadcasters have already begun to use multicasting to offer a wide array of diverse programming. Decisionmark, a media technology company, reports that at least 585 television stations offer multicast programming.[25] This programming includes news, weather, sports, and religious programming, as well as programming in several foreign languages.[26] In addition, broadcasters have indicated to the FCC that they intend to multicast to offer specialized weather reports, local alerts and traffic and travel-related information, local news, local sports, AMBER alerts for missing children, state and local political coverage, minority-oriented programming, and children's and educational programming.[27]

The use of multicasting in the wake of Hurricane Katrina provides a powerful example of its benefits. NBC Weather Plus, a digital weather channel offered via multicast, "took a key role in the coverage of Hurricane Katrina across all of the company's TV platforms."[28] Help from on-scene meteorologists from Weather Plus "was invaluable in providing expert information

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22 *Id.*

23 *First DTV Must Carry Order*, 16 FCC Rcd at 2651.

24 David J. Barrett, President & CEO, Hearst-Argyle Television, Inc., Remarks at United States Telephone Association Convention: Welcome Back, at 23-24 (Oct. 25, 2005) ("Barrett Remarks").

25 Fritts Testimony at 7.

26 *Twelfth Annual MVPD Report*, 2006 WL 521465, at *6; *In re Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules*, 20 FCC Rcd 4516, 4550 (2005) ("*Second DTV Must Carry Order*") (separate statement of then-Commissioner Kevin J. Martin dissenting in part and approving in part); Fritts Testimony at 7; Barrett Remarks at 22-23.

27 *See Second DTV Must Carry Order*, 20 FCC Rcd at 4550 (separate statement of then-Commissioner Kevin J. Martin dissenting in part and approving in part); Special Factual Submission by CBS Television Network Affiliates in Support of Multicast Carriage Requirement, CS Dkt. No. 98-120 (Jan. 13, 2004) ("CSB Special Submission"); Special Factual Submission by NBC Television Network Affiliates in Support of Multicast Carriage Requirement, CS Dkt. No. 98-120 (Jan. 8, 2004); *ex parte* presentation by the Minority Media & Telecommunications Council, CS Dkt. No. 98-120 (Jan. 26, 2004); *ex parte* presentation by the Black Education Network, CS Dkt. No. 98-120 (Jan. 28, 2004); Petition for Reconsideration of DIC Entertainment, CS Dkt. No. 98-120 (April 21, 2005); *ex parte* presentation of the National Medical Association in CS Dkt. No. 98-120 (Mar. 31, 2004); Barrett Remarks at 22-23. For instance, Roanoke, Virginia's WDBJ "is helping to stimulate consumer sales of digital tuners in [its] viewing area" by providing two locally originated multicasting services. CBS Special Submission at Exhibit D (declaration of Robert G. Lee, President & General Manager, WDBJ (TV)(DT), Roanoke, Virginia, ¶ 5).

28 *Weather Plus All Over NBC Map*, Reuters, Aug. 31, 2005, http://entertainment.tv.yahoo.com/entnews/20050831/112548180100.html.

about the storm before it hit and also in the midst of the hurricane."[29] In addition, Weather Plus meteorologists appeared on Today, NBC Nightly News, and MSNBC throughout the storm. David Verdi, the vice president of worldwide newsgathering at NBC News remarked that Weather Plus "gave us the best information we have ever had forecasting."[30]

2. Multicasting Will Also Promote Diversity in the Video Marketplace.

In addition to helping to drive the transition toward completion, multicasting will enhance diversity in the video marketplace. This is an independent public interest good, also of long historical pedigree.[31] That carriage of broadcast television's multicast programming promotes diversity is clear by virtue of simple math: it replaces one program with six or more programs in the same amount of bandwidth. Consumers thus will be able to enjoy the wide variety of rich new programming described above. Multicasting also promotes source diversity by creating programming opportunities for independent producers who are unaffiliated with cable or satellite companies.

Contrary to cable operators' claims that carriage of broadcast multicast programming will not promote diversity, approximately eighty percent of broadcasters who currently do or intend to multicast have indicated that some or all of their new services would be locally produced and/or focused.[32] Without carriage, viewers will be deprived of the many specialized forms of programming – including specialized weather reports, local alerts and traffic and travel-related information, local news, local sports, AMBER alerts for missing children, state and local political coverage, minority-oriented programming, and children's and educational programming – that broadcasters are willing to offer for free, in addition to their primary programming streams.[33]

3. Multicasting Does Not Take an Iota More of Cable System Capacity Than Analog Broadcasts.

The additional content offered by multicasting does not require the use of any additional cable capacity. To the contrary, each broadcast station's signal – whether transmitted in analog or digital – *occupies precisely the same amount of spectrum on a cable system.* As cable advocates acknowledge, a single analog signal or the entire digital signal – whether consisting of a single HDTV programming stream or all of the streams in a broadcaster's multicast offering – occupies 6 MHz of system bandwidth.[34] New digital compression technology now enables the

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29 *Id.*

30 *Id.*

31 *See, e.g.*, 47 U.S.C. § 548(a) (explaining that the purpose of the 1992 amendments to the Cable Act was "to promote the public interest, convenience, and necessity by increasing competition *and diversity* in the multichannel video programming market" (emphasis added)); *Turner I*, 512 U.S. at 663 (concluding that "assuring that the public has access to a multiplicity of information services is a government purpose of the highest order, for it promotes values central to the First Amendment").

32 *Twelfth Annual MVPD Report*, 2006 WL 521465, at *33.

33 *See supra* pp. 5-6.

34 *First DTV Must Carry Order*, 16 FCC Rcd at 2615 n.111; Cooper & Kirk White Paper at 1, 4.

entire digital signal to be transmitted using only 3 MHz.[35] In other words, the myriad programming streams made possible by multicasting can now be carried in *half of the capacity* of that taken up by a single analog channel. Meanwhile, technology has increased cable system capacity. From 1999 to 2003, cable system capacity increased by over 80%.[36] The amount of cable bandwidth available on a typical digital cable system is now 750 MHz, as opposed to the 450 MHz that was previously available on a typical analog cable system.[37]

While cable advocates suggest that the relevant standard for measuring the burden on cable here is the number of program streams that are included within 6 MHz of spectrum,[38] this suggestion reveals a fundamental misunderstanding of the carriage regime. The statutory scheme governing carriage makes clear the amount of spectrum occupied by a broadcaster's signal – and *not* the number of programming streams that may be transmitted using that spectrum – provides the relevant analytical framework here. Cable operators' carriage obligation is limited to "one-third of the aggregate number of usable activated channels."[39] The term "channel" (or "cable channel") is defined by statute as "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation)."[40] FCC regulations, in turn, define a "[t]elevision channel" as "[a] band of frequencies 6 MHz wide in the television broadcast band and designated either by number or by the extreme lower and upper frequencies."[41] The Commission has concluded that cable operators' must-carry obligations

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[35] Fritts Testimony at 12; Discussion Draft Hearing at 35 (prepared statement of Robert C. Wright); *First DTV Must Carry Order*, 16 FCC Rcd at 2615 n.111, 2616 n.115; S. Merrill Weiss & Sean D. Driscoll, Merrill Weiss Group, *Analysis of Cable Operator Responses to FCC Survey of Cable MSOs* 12 (Aug. 14, 2001) ("Merrill Weiss Group Study"). Cable operators have acknowledged that "[c]urrent compression technology . . . permits the Nation's cable television providers to divide 6 MHz of licensed digital spectrum into as many as six standard definition digital television programming streams." Cooper & Kirk White Paper at 1. Cable operators have also indicated that current technology allows for the transmission of two HDTV programming stream in one 6 MHz channel. Merrill Weiss Group Study at 12, 21. Continued innovation is likely to produce more advanced compression technology that will allow for even more efficient use of bandwidth. *See Twelfth MVPD Annual Report*, 2006 WL 521465, at *7; Barrett Remarks at 20. In fact, the FCC has stated that current compression technologies can allow for up to *twelve* programming streams to be carried using 6 MHz. FCC, Media Bureau, *Further Report on the Packaging and Sale of Video Programming Services to the Public*, ¶ 92 n.106 (Feb. 9, 2006), available at http://harunfoss.fcc.gov/edocs_public/attachment/DOC-2637A1.pdf ("Video Programming Services Further Report"); *see also* J.H. Snider, *Multicast Must-Carry for Broadcasters: Will it Mean No Public Interest Obligations for DTV?* (Dec. 2003) (New America Foundation Spectrum Policy Program, Spectrum Series Issue Brief #13); *see also* Merrill Weiss Group Study at 19, tbl. 4.

[36] Merrill Weiss Group Study at iii, 27 (cable operators estimating that technology allows the transmission of as many as 12-14 standard programs in one 6 MHz channel).

[37] *Second DTV Must Carry Order*, 20 FCC Rcd at 4521 n.35 (reporting that "the majority of cable subscribers are connected to systems with at least 750 MHz capacity, and that operators continue to build out their facilities"); *see also* Merrill Weiss Group Study at iii (estimating that in 2003, 86 percent of cable subscribers received 750 MHz or greater bandwidth).

[38] *See* Cooper & Kirk White Paper at 4, 16.

[39] 47 U.S.C. § 534(b)(1)(B).

[40] *Id.* § 522(4).

[41] 47 C.F.R. § 73.681.

should continue to be calculated by reference to megahertz, rather than programming or bits.[42] The relevant standard, then, is the "channel" – or 6 MHz – not the number of programming streams included in that channel.

4. The Digital Transition Promises to Deliver Myriad Public Interest Benefits In Addition to those Created by Multicasting.

The transition to digital television promises to deliver important public interest benefits far beyond the additional content that it will enable broadcasters to offer to viewers. At the end of the transition, a broad swath of the spectrum currently used for analog transmissions will be reclaimed by the government and repurposed for advanced wireless and public safety needs.[43] The proceeds from the auction of commercial spectrum will go to a digital-to-analog converter box program, a public safety interoperability program, and other programs, as well as general deficit reduction.[44]

The perceived need to quickly free spectrum for use by emergency services was heightened by communications breakdowns among "first responders" during Hurricane Katrina and its immediate aftermath. As several members of Congress have explained, the "devastating breakdown in emergency communications, as phone lines, cell towers and electrical systems were wracked by Hurricane Katrina, [made] it nearly impossible at times for many first responders and government officials on the Gulf Coast to talk to each other."[45] Thus, they have emphasized that the government "needs to develop a comprehensive, interoperable emergency communications plan and . . . provide additional radio spectrum that will allow first responders to communicate over long distances using the same radio frequencies and equipment."[46]

One of the chief mechanisms for accomplishing these goals is to encourage the timely conclusion of the digital transition and the return of the analog broadcast spectrum: "the transition will provide both the necessary funding and available spectrum for public safety officials and emergency personnel across the country to upgrade their communications infrastructure."[47] Indeed, because of this longstanding, and very real, concern about the

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42 *See First DTV Must Carry Order*, 16 FCC Rcd at 2615-16.

43 Digital Television Transition and Public Safety Act §§ 3002-3003. At the end of the transition, "[t]wenty-four megahertz of spectrum currently used for television broadcast channels 63, 64, 68, and 69 will be returned and used for first responders and other critically important public safety needs. *In re Second Periodic Review of Commission Rules and Policies Affecting Conversion of Digital* Television, Report and Order, 19 FCC Rcd 18279, 18284 (2004) ("*Second DTV Periodic Report and Order*"). "The remaining 84 MHz in the 700 MHz band (currently television broadcast channels 59-62 and 65-66) have been or will be auctioned for use by new wireless services." *Id.*

44 Digital Television Transition and Public Safety Act §§ 3004-3013.

45 John McCain, Joseph Lieberman, Jane Harman & Curt Weldon, Op. Ed., *A Fix for First Responders*, Wash. Post, Sept. 19, 2005, at A17.

46 *Id.*

47 151 Cong. Rec. S14211 (Dec. 21, 2005) (statement of Sen. Hatch); *see also* Discussion Draft Hearing at 2 (statement of Rep. Upton) ("Our efforts are all about making sure the digital transition happens in a timely and orderly fashion to ensure that the [c]onsumers will, as seamlessly as possible, get the benefits of digital television.

availability of additional spectrum for public safety uses, the FCC has emphasized that "it is desirable to encourage broadcasters to offer digital television as soon as possible."[48]

B. The Benefits Of Digital Television Render The Preservation Of Free, Over-the-Air Broadcasting Even More Important Now Than It Was At The Time That Congress Adopted The Current Must-Carry Statute In 1992.

The benefits that digital television can offer to the American public serve only to amplify the importance of preserving free, over-the-air broadcast television, which Congress and the Supreme Court recognized as a government interest of the highest order at the time that the must-carry statute was enacted in 1992.[49] As the FCC has acknowledged, broadcast "[t]elevision has played a critical role in the United States in the second half of the twentieth century."[50] "Broadcast television's universal availability, appeal, and the programs it provides – for example, entertainment, sports, local and national news, election results, weather advisories, access for candidates and public interest programming such as education television for children – have made broadcast television a vital service."[51]

The death of broadcast television would deliver a devastating blow to the public interest; it would leave some 15 million over-the-air television households – many of whom cannot afford cable or satellite television in the alternative – without any source of television, let alone digital television and all of the benefits that it can provide.[52] In thirteen major television markets, fewer than 50% of television households subscribe to cable.[53] And "analog [over-the-air] households are disproportionately African-American, Hispanic, and low-income."[54] And many Americans with access to other delivery methods rely on broadcast television as an important source of local news and general entertainment programming.[55]

Of course, if we achieve this goal, not only will the consumer benefit but also public safety, which has an interest in utilizing the broadcasters' return spectrum for critically important communication.").

48 *DTV Fifth Report & Order*, 12 FCC Rcd at 12812; *id.* at 12823; *see id.* at 12812("The more quickly that broadcasters and consumers move to digital, the more rapidly spectrum can be recovered and then be reallocated or reassigned.").

49 *See Turner I*, 512 U.S. at 662-63; *DTV Fifth Report & Order*, 12 FCC Rcd at 12820-21, 12834.

50 *Id.* at 12810.

51 *Id.* at 12820.

52 *See Twelfth Annual MVPD Report*, 2006 WL 521465, at *5; *see also* 1992 Cable Act § 2(a)(11), (12).

53 *Over The Air Staff Report*, 2005 WL 473322, at *2.

54 *Id.* (internal footnotes omitted); *see also* 151 Cong. Rec. S12202 (daily ed. Nov. 2, 2005) (statement of Sen. Stevens).

55 A recent study conducted by Harris Interactive concludes that "[s]eventy-seven percent of U.S. adults watch local broadcast news." *Most Get News From Broadcasters*, United Press Int'l (Feb. 25, 2006), http://upi.com/NewsTrack/view.php?StoryID=20060225-110859-4086r; *see* Harris Interactive, *The Harris Poll #20: Seven in 10 U.S. Adults Say They Watch Broadcast News at Least Several Times a Week* (Feb. 25, 2006), http://www.harrisinteractive.com/harris_poll/index.asp?PID=644. "Fifty-one percent of Americans get their news every day from local TV news, topping a list of information sources in today's fractured media landscape." Paul J.

Furthermore, the extinction of broadcasting would raise grave national security and emergency management concerns. Broadcasters are first responders:

> [O]ne of their most important functions is to provide critical 'real time' information to viewers in times of emergencies, both manmade and natural. Unlike the pay television services, local broadcasters are able to reach nearly 100 percent of a local community. Television broadcasters are thus an essential part of emergency preparedness. Federal, state, and local governments have expressly relied on broadcast television as a means to keep the public informed of critical emergency information. Broadcast television is a longstanding and key component of the Emergency Alert System for official government communication with the public during times of emergency.[56]

Indeed, local broadcasters have often played an important role in keeping local communities safe in times of emergency. Concerns relating to communications in emergency situations were a motivating force for original must-carry.[57] These concerns are especially salient today, given the homeland security issues that our nation faces[58] and in light of the devastation caused by recent national disasters such as Hurricane Katrina.[59]

C. As Cable Providers And Consumers Move To The Digital Television World, Broadcasters Face Greater Hurdles To Survival Than They Did In The 1990s.

As we have explained, our long-standing national interest in the preservation of free over-the-air television is at stake here. The hurdles to broadcasters' survival in the burgeoning video marketplace, however, are even greater than they were when Congress took action in 1992 to address this important goal.

Since the advent of cable and satellite television, viewers have migrated steadily from broadcast to these other providers. Indeed, the FCC recently found that broadcast television's

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Gough, *Gallup: People Want Local News*, The Hollywood Reporter.com, Dec. 22, 2004, http://www.hollywoodreporter.com/thr/television//brief_display.jsp?vnu_content_id=1000741092.

[56] Donovan Testimony at 3.

[57] *See* S. Rep. No. 102-92, at 42, *as reprinted in* 1992 U.S.C.C.A.N. 1133, 1174-75 (1991) (listing "emergency broadcast" services as among the "vital local service[s]" that broadcasters provide and that Congress sought to protect against cable operators' "use [of] their market power either to preclude carriage of television broadcast signals or to carry such signals but without proper consideration to the programmer").

[58] Indeed, former Director of Homeland Security Tom Ridge attested that broadcasting is in the front line of public safety preparedness and responsiveness. *See* Bill McConnell, *Ridge Takes the Point*, Broadcasting & Cable, June 2, 2003, http://broadcastingcable.com/article/CA302462.html?display=Washington (quoting Tom Ridge as stating "[t]he media during times of crisis is a critical part of what we do").

[59] *See Regional Hearing Before the FCC* (Mar. 7, 2006) (testimony of Dave Vincent, WLOX Station Manager, Jackson, Mississippi) (explaining how WLOX was instrumental in "mak[ing] sure the viewing or listening public had the necessary information to weather the storm").

ability to compete has suffered in recent years: "[B]roadcast television stations' audience shares have continued to fall as cable and DBS penetration, the number of cable channels, and the number of broadcast networks continue to grow."[60] The number of television viewers who rely solely on over-the-air broadcasting has waned, such that currently 14% of television households (or approximately 15.36 million) rely solely on broadcast television.[61] Meanwhile, as many as 60% of television households subscribe to cable.[62]

Cable's edge over broadcast television to date has stemmed largely from its inherent ability to offer viewers far more sources of programming than broadcasters can. And, as indicated above, cable system capacity has increased significantly with recent technological advances, which has only hastened the already rapid proliferation of programming sources that has long been underway. Indeed, in 2005, the FCC found "531 satellite-delivered national programming networks, an increase of 143 networks over the 2004 total of 388 networks."[63] The increase in the number of available sources of video programming – which remains ongoing due to innovation – has fundamentally altered the environment that broadcasters face by placing them in the midst of an increasingly fragmented market.[64] Indeed, between 1992 and 2003, cable revenue from local advertising increased approximately 367%,[65] and this trend is a continuing one.[66] And, because advertising revenues are tied to viewership, the proliferation of programming sources has made, and can be expected only to continue to make, it more difficult for broadcasters to compete for viewers and, thus, advertising revenues.

In order to compete in this environment, broadcasters, like cable networks and other video programmers, need to differentiate themselves by airing niche programming aimed at specific target audiences. Multicasting offers broadcasters the opportunity to do just that. But without the certainty that the multicasts that broadcasters invest in and transmit will not be blocked and removed from their signal by cable operators before that programming reaches consumers, multicasting is not a viable financial option.[67] Indeed, the absence of an anti-stripping requirement is such a disincentive for broadcasters to invest in developing digital programming that *eighty percent* of broadcasters have indicated that they will not invest in

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60 *Twelfth Annual MVPD Report*, 2006 WL 521465, at *30; *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13698 (stating that "the ability of local stations to compete successfully in the delivered video market [has been] meaningfully (and negatively) affected," particularly "in mid-sized and smaller markets").

61 *Twelfth Annual MVPD Report*, 2006 WL 521465, at *6.

62 *Id.* at *12 n.70.

63 *Id.* at *6.

64 *Id.* at *47-50.

65 *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eleventh Annual Report, 20 FCC Rcd 2755, 2773-74 (2005) (citing NCTA, *Cable Developments 2004*).

66 *Twelfth Annual MVPD Report*, 2006 WL 521465, at *42, Table 4.

67 Paul Davidson, *Local Stations Multicast Multishows*, USA Today, Jan. 28, 2004, *available at* http://www.usatoday.com/money/media/2004-01-28-multicast_x.htm ("Multicast Multishows") ("[M]any broadcasters say they will scrap or scale back their multicasting plans if the FCC doesn't mandate cable carriage.").

developing digital programming without an anti-stripping mandate.[68] For example, DIC Entertainment has explained that it will not be able to offer its proposed free, advertiser-supported, over-the-air digital children's television service unless all streams of its multicast offering are guaranteed cable carriage.[69] Simply put, absent the certainty that multicasts will actually reach cable subscribers, broadcasters face a Hobson's choice: undertake a financial investment that they cannot bear or decline to offer the advanced programming that will allow them to compete in the market.[70]

Exacerbating the inherent obstacles of the changing video programming market is cable's underlying and powerful incentive to refuse to carry local broadcast programming. Cable operators have a financial interest in many cable programmers who compete with broadcasters for advertising, which motivates cable to discriminate against broadcaster and in favor of programming in which they have an equity stake, regardless of the quality of the programming or viewer preferences. "Simply stated, cable has little interest in assisting, through carriage, a competing medium of communication."[71] Congress recognized this fact in enacting the current must-carry statute,[72] and market developments demonstrate that this concern is even more valid today.[73] Due to these market dynamics, broadcasters have faced significant difficulties in obtaining cable carriage for multicast programming.[74] Although the FCC has indicated that by May 2005 "cable operators were carrying commercial broadcasters' multicast programming in more than 50 markets,"[75] this figure is overstated because it includes instances where cable operators agreed to carry only a portion of the multicasting programming offered by the relevant broadcasters. "For example, several cable operators agreed to carry CBS stations extra coverage of the 2005 NCAA men's college basketball tournament on multicast channels."[76] This type of

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68 *Twelfth Annual MVPD Report*, 2006 WL 521465, at *33.

69 Fritts Testimony at 9.

70 The competitive disadvantage will only be compounded by the fact that subscribers now rely on branded groups of channels to help them select which programs to view, rather than purely free-standing program sources that lack the positive synergies associated with a branded multi-channel programming source. For instance, the "Discovery" family includes not only the "Discovery Channel," but also co-branded cable channels "Discovery Health," "Discovery Times," "Discovery Kids," "Discovery Home," "Discovery En Espanol," and "Discovery HD Theater," as well as popular cable channels "TLC," "Animal Planet," "Travel Channel," "BBC America," "The Science Channel," "Military Channel," and "FitTV." *See* Discovery Communications Inc., "Our Networks," http://www.discovery.com/ (last visited March 22, 2006). Due to this market dynamic, broadcasters will remain at a competitive disadvantage without an anti-stripping mandate, not only because they will lack the ability to compete with niche programming aired by cable networks and other programmers as a general matter, but also because they will not be able to take advantage of the synergies and efficiencies associated with branded multi-channel groups of programming.

71 *Turner II*, 391 U.S. at 200.

72 1992 Cable Act § 2(a)(5), (14)-(16).

73 *See Twelfth Annual MVPD Report*, 2006 WL 521465, at *6 (describing vertical integration in the cable industry).

74 Fritts Testimony at 9 n.14.

75 *Twelfth Annual MVPD Report*, 2006 WL 521465, at *5.

76 *Id.* n.14.